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UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

CASE NUMBER _____

ERNESTO ALEOTTI, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR

WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court Judge, in the trial of a criminal case, should make an inquiry, upon the record, of a non-testifying defendant, prior to the close of the trial of the case, as to whether or not the defendant is knowingly, intelligently, and voluntarily waiving their right to *testify*.

LIST OF PARTIES

The Parties involved in this case are the Petitioner, Ernesto Aleotti, who was the Defendant and the Appellant below. For the United States Government, acting as the prosecuting authorities, J. Ramsey Johnson, United States Attorney, John R. Fisher, Steven J. McCool, William B. Wiegand, III, and Laura A. Cordero, Assistant United States Attorneys.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ernesto Aleotti, does hereby respectfully pray that a Writ of Certiorari issue from this Honorable Court to review the Judgment and Opinion of the Court of Appeals for the District of Columbia, which Opinion bears date March 3, 1994.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals for the District of Columbia, dated March 3, 1994, is reprinted, with this Petition. The Opinion will be recorded in Atlantic Reports, Second (A2d), however, the Opinion is not yet published in the official reports. The Opinion is included as an Appendix to this Petition document. Reference to which Opinion is hereby made for all pertinent purposes.

STATEMENT OF JURISDICTION

The Petitioner, Ernesto Aleotti, was originally charged with violation of the Code of the District of Columbia, Section 22-403. The Superior Court for the District of Columbia, Criminal Division, had original jurisdiction of the subject matter. After a brief trial, the Petitioner was convicted of the offense, and he appealed his conviction to the Court of Appeals for the District of Columbia. The Court of Appeals for the District of Columbia affirmed the conviction. The Supreme Court of the United States has the jurisdiction to review the Judgment in this case, which action by the District of Columbia Court of Appeals is final, whereas the judgment was entered by the Court of last resort, in this case, the Court of Appeals for the District of Columbia.

The jurisdiction of this Honorable Court to issue a Writ of Certiorari is invoked by the Petitioner, pursuant to the United States Code, Title 28, Section 1257, whereas this Writ of Certiorari, involves the denial of a basic Constitutional right of the Petitioner, by virtue of the fact that the Petitioner was denied his right to *testify* in the trial of his case, pursuant to the guarantees of the Fifth and Sixth Amendments to the United States Constitution, which provisions are made applicable to the District of Columbia, pursuant to the Fourteenth Amendment. The Petitioner was denied his rights to a fair trial, by virtue of the fact that he did not waive his right to *testify*, and by virtue of the fact that the Trial Court failed to protect his right to

testify and, therefore, violated his rights as guaranteed to him by the United States Constitution. The Judgment by the District of Columbia Court of Appeals, in this case, was entered on March 3, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Various provisions of the United States Constitution are involved in this case, namely, Amendment V, Amendment VI, and Amendment XIV.

The pertinent part of the Fifth Amendment to the Constitution, which is applicable to this case is as follows, to-wit:

> "No person shall be ... deprived of life, liberty, or property, without due process of law...."

The pertinent part of Amendment VI to the Constitution, which is applicable in this case is as follows, to-wit:

> "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and of the assistance of counsel for his defense."

The pertinent part of Amendment XIV to the Constitution, which is applicable in this case is as follows, to-wit:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

REASONS FOR GRANTING THE WRIT

The Petitioner respectfully submits that a Writ of Certiorari should issue in this case, whereas there are special and important reasons for granting the Writ. The Petitioner, recognizing the judicial discretion exercised by this Court in

these regards, respectfully submits that, in this case, the decision by the District of Columbia Court of Appeals was erroneous, affirming the conviction of the Appellant, whereas the affirmation by the Court of Appeals was based upon erroneous application of important questions of federal law and, further, the opinion by the District of Columbia Court of Appeals, affirming the conviction, based upon the application of the law, in this case, conflicts with, and is contrary to, decisions of other State Courts on this same issue, and, in addition, such reasoning and ruling by that Court is contrary to the decisions made by United States Districts Courts, which have addressed this issue.

Thus, whereas various State Courts and Federal Courts and Courts of Appeals have reviewed this issue, there is a

conflict among the decisions by the various Courts in this regard and, therefore, this important question of federal law, as presented in this Appeal, should be decided now, and at this time in our history, by the United States Supreme Court.

As a footnote, the Appellant also respectfully submits that another important point and reason for granting the Writ of Certiorari in this case is because the Supreme Court of the United States has not ever addressed this precise issue before. Thus, the Supreme Court needs to resolve this issue now and articulate the rule of law on this issue, and settle the discrepancies which currently exist among the rulings from the various Courts

The central issue in this case is whether or not, in a criminal trial, when

an accused individual chooses not to *testify*, the Trial Court Judge, during the trial itself, and before the case is closed, should inquire of the defendant, as to whether or not that individual understands that they have the right to *testify* and, further, whether or not they are making the decision to waive their right to *testify* in a knowingly and intelligently and voluntary manner. The State Courts, which have decided this issue, are divided in their opinions, and many of the Federal Courts which have reviewed this question, are, likewise, divided in their opinion. Thus, as a result of the conflicts in the rulings on this issue among the various State and Federal Courts, the United States Supreme Court should address this issue now, at this point in our history, and render its opinion.

Another reason why this issue should be decided by this Honorable Court is the fact there are an increasing number of individuals, being charged with criminal offenses in the United States and, further, there are an increasing number of individuals who do not *testify* at trial and use that issue as a basis for an Appeal and for filing Petitions for Habeas Corpus. This situation is occurring at both the State and Federal level, thereby creating an extra burden upon the Appellate Courts to be required to hear the Appeal and, often, the Petition for Habeas Corpus, both of which are based upon the same set of facts and the same issue, the failure to *testify*.

Therefore, for all of these various important reasons, the United States Supreme Court should issue a Writ of Certiorari in this case, and decide this

issue. The Petitioner deserves the right to have this Honorable Court resolve this issue.

STATEMENT OF THE CASE

I.

Introduction

The Petitioner, Ernesto Aleotti, is a white male, fifty two (52) years of age, at the time that he was charged. The Petitioner is a hard working, law abiding citizen, who had never been charged with any other type of criminal offense in the United States.

The Petitioner was indicted in the Superior Court of the District of Columbia, Criminal division, for the misdemeanor offense of malicious injury to property, for having allegedly punctured two (2) tires on a vehicle, on or about May 3, 1992. Mr. Aleotti

entered a plea of not guilty, and was subsequently tried in the Superior Court of the District of Columbia, Criminal Division, for this offense.

After a brief trial during the week of December 7, 1992, the Petitioner was convicted. The Petitioner did not *testify*, contrary to his wishes to *testify*. For some reason, unknown to the Petitioner to this day, he was not allowed to *testify* on his own behalf, although he wanted to *testify*, as was clearly demonstrated at the original sentencing hearing and during the Post-Trial hearing in this case relative to his Motion for a New Trial.

The Petitioner appealed his conviction to the District of Columbia Court of Appeals. The Court of Appeals, refusing to recognize the various violations of due process of law, which

occurred at the trial, as a result of the denial of his right to *testify*, affirmed his conviction.

The Petitioner respectfully requests this Honorable Court to review the Judgment of the District of Columbia Court of Appeals, whereas their ruling is erroneous and contrary to the basic principle of due process of law relative to the issue presented in this case. The question presented in this case involves substantial questions of Constitutional law issues, which issues were originally noted in the Petitioner's Motion for a New Trial in the Lower Court, and also in the Brief which he filed, in support of his Appeal, with the District of Columbia Court of Appeals. The Petitioner addressed these Constitutional law issues in his Appeal, and the District of Columbia Court of Appeals totally ignored

them, issuing an Opinion which is directly contrary to the rule of law which is applicable in this case. The Petitioner timely and properly presented these issues of federal law at the Lower Court level, and this Honorable Court now has the jurisdiction to review the Judgment, pursuant to this Writ of Certiorari.

II.

Argument

The Petitioner, Ernesto Aleotti, had never been charged with any other criminal offense, prior to this case, and, as such, he was totally unfamiliar with the American criminal justice system. This case was his very first experience with the criminal justice system in the United States.

At the trial, the Petitioner assumed that he would, at some point in time,

take the stand and *testify*. During the trial only two (2) witnesses were called for the defense, two (2) character witnesses. Upon learning of this strategy by his counsel, the Petitioner indicated to his counsel that he wanted to *testify*. The Petitioner informed his counsel that he was prepared to take the stand and to *testify*. However, his counsel did not change his strategy.

As this Honorable Court well knows, a basic and fundamental right, guaranteed to every citizen of this great Nation, is the right to a fair trial. In particular, the United States Constitution, Amendment V, provides in pertinent part as follows, to-wit:

> "No person ... shall be deprived of life, liberty, or property, without due process of law...."

The concept of "due process of law" is the very essence of our American

system of jurisprudence. Due process, while variously defined, has a very simple and universal meaning; due process is justice; it is fair play; it is the "ordered concept of liberty". Due process is, perhaps, the very essence of the concept of the rule of law in the United States.

The Petitioner would respectfully submit that the classic definition of the concept of "due process of law" was articulated in a vintage case, in which the Court defined the concept as follows, to-wit:

> By "due process of law" is meant a process which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, whenever it is necessary for the protection of the parties, it must give them an <u>opportunity to be heard</u> respecting the justice of judgment sought. The clause in

> question (sic, due process) means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either without the observances of those general rules established in our system of jurisprudence for the security of private rights. State v. Earle, 66 SC 194, 44 SE 781.

As this Honorable Court has very artfully articulated in various cases, "Our due process of law is a summarized constitutional guarantee of respect for those personal immunities which ... are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'...". Rochin v. California, 342 US 165.

Thus, it is incumbent upon this Honorable Court to examine all of the legal ramifications and consequences of the failure of our Courts to protect the rights of the Petitioner and to insure that the rudiments of due process of law,

are followed, including the right of an accused individual to *testify* in their own criminal trial. The Petitioner respectfully submits that the obstruction of his right to *testify* is a direct infringement of his constitutional rights to due process of law.

The Fifth Amendment guarantees "procedural standards adequate and appropriate" to protect the accused, at all times, from being improperly convicted. Chambers v. Florida, 60 S.Ct, 472, 309 U.S. 277, 84 L.Ed. 716. Due process of law, in a criminal prosecution, consists of several elements, including, most particularly, a law creating or defining the offense, a Court of competent jurisdiction, accusation in due form notice and opportunity to defend, a trial before an impartial Judge or Judge and jury

according to established criminal procedure, and a right to be discharged unless found guilty. Pleas see Rideau v. State of Louisiana, 83 S.Ct. 1417, 373 U.S. 723, 10 L.Ed. 2d 663. U.S. v. Lovasco, 97 S.Ct 2044, 431 U.S. 783, 52 L.Ed 2d 752.

One of the essential elements of due process of law in criminal cases is the "opportunity to defend". Inherent in this element is the right of the accused to "meet the charge against him". Thus, the accused has absolute right to take the stand and *testify* on his own behalf, if he wishes. U.S. v. MacCollum, 96 S.Ct 2086, 426 U.S. 317, 48 L.Ed 2d 666. Denial of that right would severely diminish the arsenal of methods available to an accused to meet the charges against him.

In this case, the Petitioner wanted to *testify* on his own behalf at his trial. He fully expected to take the stand, and he was prepared to do so. Unfortunately, however, his rights fell through the cracks of our legal system and, thus, he did not get the opportunity to *testify*. The Petitioner had a real desire to *testify* at his trial, and he should have been given that opportunity.

Due process of law guarantees that an accused shall have the opportunity to defend the charges, an important aspect of which is the right of the accused to *testify* on their own behalf. Thus, if an accused desires to *testify* on their own behalf, and they are not given that chance, then, in that event, their due process rights have been violated. The Petitioner harbored a strong desire to *testify*, and there is no indication, in

the record, that he waived his rights in this regard. Therefore, the Petitioner's due process rights have been violated, because an oversight at his trial prevented him from testifying. There is a means whereby this situation can be prevented - an inquiry by the Trial Court of the accused, at the time of the trial.

The Petitioner recognizes the principle of law that, an accused, in a criminal case, is not required to *testify*. The Constitution of the United States, Amendment V, provides for this right in the following language, to-wit:

> "No person ... shall be compelled in any criminal case to be a witness against himself ...."

As such, the accused, in a criminal case, has two (2) choices relative to testifying, to *testify*, or not to *testify*. Then, in the event that an accused, in a criminal case, does not

testify, the question becomes, whether or not the accused made a voluntary, knowing, and intentional and intelligent waiver of his right to *testify*. This is clearly the doctrine as provided for in cases addressing this particular issue.

This Honorable Court has made it clear that a criminal defendant enjoys the Constitutional right to *testify* on his own behalf. As this Court stated in Rock v. Arkansas, 483 U.S. 44, 49-52, 107 S.Ct. 2704, 2708-2709, 97 L.Ed. 2d 37, "At this time in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has a right to take the witness stand and *testify* in his or her own defense". The Court went on to say in Rock that the right to *testify* is "one of the rights that are essential to due process of law

and a fair adversary process" ID. at 51, 1076 S.Ct. at 2709.

Further, the Court in Rock indicated that the right to *testify* is, therefore, protected by the due process clauses of the 5th and 14th Amendments, which guarantee the defendant "an opportunity to be heard in his defense". Finally, the Court went on to day that the right to *testify* is a "necessary corollary to the Fifth Amendment's guarantee against compelled testimony", which ultimately protects the defendants "choice of whether to *testify* in one's own defense", ID. at 52-53, 107 S.Ct. at 2709-2710.

It is, also, beyond dispute that counsel for the accused has the ultimate responsibility for many tactical trial decisions, such as which witnesses to call, which arguments to raise on Appeal, and other such questions. Jones v.

Barnes, 463 US 745, 103 S.Ct. 3308, 77 L.Ed 2d 987. However, there are certain fundamental and personal Constitutional rights which may only be waived by the accused. Johnson v. United States, 513 A2d 798 (D.C. 1086).

The accused must decide whether to plead guilty, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct, 1709 23 L.Ed 2d 274; Carmichael v. United States, 479 A2d 325 (D.C. 1989); and, whether to ask for a jury trial, Adams v. United States, ex rel, McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed 268, Jackson v. United States, 262 A2d 106, (D.C. 1970); and whether to Appeal, Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822; Johnson, Supra; and whether to forego the assistance of counsel, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, Fowler v. United States, 411 A2d 618 (D.C. 1980). Thus, the accused must

make the ultimate decision relative to these fundamental rights and his decision will prevail, even if defense counsel disagrees.

The decision whether to *testify* can be the single most important factor in a criminal case. As the Supreme Court noted in Rock v. Arkansas, Supra, "In fact, the most important witness for the defense in many criminal cases is the defendant himself". The Court went on to say that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself". Also citing Green v. United States, 365 U.S. 301, 81 S.Ct 653.

Thus, there is no question that the decision to *testify* is "crucial in governing defendant's fate". People v. Curtis, 681 P.2d 504 (Colo.). Thus, an

accused who chooses to *testify* may actually decrease his or her chance of acquittal; however, "the wisdom or unwisdom of the defendant's choice does not diminish their tight to make it". Curtis, Supra. Wright v. Estelle, 572 F2d 1079.

Therefore, as the District of Columbia Court of Appeals noted in the analysis in the Boyd case, "the right to *testify* advances important dignity interests which can only be served by honoring the defendant's decision". Quoting Rock, that Court indicated in Boyd, that "an accused's right to present his own version of events in his own words" is "even more fundamental to a personal defense than the right of self representation", as was established in Faretta, Supra. The Court, in Boyd, specifically provided that the accused's

choice "must be honored out of that respect for the individual which is the lifeblood of the law". The Court in Boyd stated this concept most succinctly, when it provided as follows, to-wit:

> The right to testify, like the right of self representation, is rooted in the notion that when society, through its government, brings an individual before the Court to face criminal charges, "that respect for the individual which is the lifeblood of the law" requires that the defendant be allowed, if he so desires, to speak directly to his accusers, and the Court and jury that will decide his fate. Boyd, Supra. United States v. Teague, 908 F2d 752 (11th Cir. 1990).

The District of Columbia Court of Appeals, in the case of Boyd v. United States, 586 A2d, at page 670, specifically set forth the criteria, relative to the concept of the right of an accused to *testify*, in very clear and succinct language. The points that were

addressed in Boyd, in this regard, are as follows, to-wit:

> Defendant's right to testify is protected by due process clauses of 5th and 14th Amendments which guarantee a defendant an opportunity to be heard in his defense, compulsory process clause of 6th Amendment, and 5th Amendment, guarantee against compelled testimony which ultimately protects defendants choice of whether to testify in one's own defense. U.S.C.A. Const. Amends. 5, 6, 14.

Continuing on, the Court went on to provide as follows, to-wit:

> There are certain fundamental and personal Constitutional rights which may only be waived by defendant; thus, the defendant must decide whether to plead guilty, whether to ask for a jury trial, or whether to appeal, and whether to forego assistance of counsel. U.S.C.A. Const. Amend. 6.

Further, the Court was clear relative to the importance of the accused's rights to *testify*, when it provided as follows, to-wit:

> Defendant's right to testify in criminal trial is a fundamental and personal right which can only be waived by defendant. U.S.C.A. Const. Amend. 5, 6, 14.

Then, the next question is whether or not the failure to *testify*, by a non-testifying defendant, was a knowing and intentional and voluntary waiver by them of their right to *testify*. Thus, the essential question in any such situation is whether a non-testifying defendant made a "waiver" of his right to *testify*. While the concept of "waiver" may vary from case to case, nevertheless, the principal meaning and interpretation of the concept of "waiver" remains the same, which is, simply stated, the intentional abandonment or relinquishment of a known right. Johnson v. Zerbst, 58 S.Ct. 1019, 304 US 458, 82 L.Ed. 1461. Evans v. U.S., 83 A2d 876.

Further, the concept of "waiver" involves the notion of a voluntary and understanding relinquishment of the right and an essential element of a "waiver" is the opportunity for choice, between the relinquishment of the right and the enforcement of the right, in question. Thus, voluntary choice seems to be the essence of the concept of "waiver". Albemarle County v. Massey, 183 Va 310, 32 SE 2d 228.

Also, there can be no "waiver" unless the party, against whom the "waiver" is invoked, was in possession of all of the material facts, and in full knowledge of his rights and of the facts which would have enabled him to have taken the effectual action for the enforcement of such rights. Helvering v. Ethel D. Co., F2d 761, 63 App. D.D. 157.

Further, the District of Columbia Court of Appeals, in the Boyd case, addressed and reconfirmed the general notion of the importance of the concept of "waiver" and the Court set forth the standard for determining when, in fact, a "waiver" has occurred. In particular, the Court in Boyd established the following criteria in these regards, to-wit:

> "The general rule is that a personal and fundamental right will be deemed waived only if there is record evidence demonstrating intentional relinquishment or abandonment of known right or privilege." (Emphasis added.)

The decision to *testify*, like the right to determine what plea to enter, and the right to a jury trial, and the right to counsel, and the right to be present at trial, is so fundamental that procedural safeguards must be in place on the record to ensure that the defendant's

waiver of the right to *testify* was made voluntarily, knowingly, and intelligently. State v. Neuman, 371 S.E. 2d 77.

The Court, in the Neuman case, being the majority, freely acknowledged the fact that the right to *testify*, in one's own defense, is personal to the defendant and, further, its free exercise hinges upon the accused's understanding of his privileges and of the rules of waiver. The Court went on to say in Neuman, that, as with other personal rights, the right to *testify*, which is a fundamental right, central to the fairness and the dignity of the criminal trial, might be unwittingly lost in the absence of intervention by the Trial Court. Since the colloquy rule lessens the chance of an uninformed or unintelligent waiver, there is ample reason to apply the subtle

rules of personal waiver in this context. United States v. Martinez, 883 F2d 750, 58 USLW 2210.

Further, the "ratio decidendi" for this rule is a fear that an accused may lose fundamental rights, not in the clear light of considered deliberation, but in the obscuring haze of ignorance. The Petitioner, in the instant case before this Honorable Court, just as in the Martinez case, wanted to *testify*, and expressed his desire to *testify* to his lawyer only to be rebuffed by his lawyer. In the Martinez case, as in this case, the government had not shown, and could not show, on the record, that the Appellant was ever informed, or made aware, that the decision whether to *testify* was his to make, and not his lawyer's. That is the situation in this case, as well.

Further, in this case, as in the Martinez case, the government can not demonstrate that the Petitioner was aware that he was required to interrupt the Court proceedings and personally assert his testimonial privilege, not withstanding his lawyer's objections. In fact, the record clearly demonstrates, in this case, as in the Martinez case, precisely the opposite. The right to *testify* is fundamental and can not be waived by counsel. It can only be waived by the accused.

Also, equally as important, is the legal principle that Courts indulge every responsible presumption against the waiver of fundamental Constitutional rights and they do not presume acquiescence in the loss of fundamental rights. McKinney v. United States, 208 F2d 844, 93 U.S. App. Dc 222.

Finally, the Court in Boyd, Supra, specifically, set forth the notion that the Trial Court must, in furtherance of its duty, make an inquiry to determine whether or not the waiver by the defendant of his right to *testify* was met, applying the Johnson v. Zerbst standard, Supra. In particular, the Court in Boyd, Supra, said as follows, to-wit:

> Defendant's right to testify is one of those constitutional rights in which Johnson v. Zerbst standard must apply in determining whether defendant has waived that right; accordingly, Court in such situation has serious and weighty responsibility to determine whether there is intelligent and competent waiver by defendant. U.S.C.A. Const. Amends. 5, 6, 14. (Emphasis added.)

Finally, the Court, in Boyd, set the standard for Appellate review when it provided as follows, to-wit:

> Once trial Judge became aware that defendant was asserting right to testify, trial Judge had duty to determine whether she (accused) had made knowing and intelligent waiver, and failure of Judge to hold hearing was harmful error warranting remand. U.S.C.A. Const. Amends. 5, 6, 14.

Also, and equally as important, the Court further defined the concept of waiver, as follows, to-wit:

> Trial Court is required to conduct on-the-record colloquy when defendant complains about counsel's preparation and absent such record evidence of express waiver, defendant's rights will not be treated as waived. (Emphasis added)

The rule requiring the Trial Court to outline the accused's rights and to inquire of them, relative to their understanding of their basic rights, form the basic procedure for the waiver of personal and fundamental rights. The right of the accused to *testify* in a criminal trial is a fundamental and

personal right which can only be waived by the accused.

Thus, the general rule is that a personal and fundamental right will be deemed to be "waived", only if there is record evidence demonstrating "an intentional relinquishment or abandonment of a known right or privilege". Boyd, Supra. Johnson, Supra. The Courts have stated, often times, that the Trial Judge is required to engage the defendant in an "on the record" colloquy to ensure that the waiver of such rights is knowing and intelligent. Further, the Courts have stated that absent such record evidence of an express waiver, the defendant's rights will not be treated as waived. The right to *testify* is fundamental to a fair trial, and the Courts have a "serious and weighty responsibility to determine whether there is an intelligent

and competent waiver by the accused". Boyd, Supra., citing Johnson, Supra.

Many Courts, State and Federal, have held that the Trial Court has a sua sponte obligation to inquire of a non-testifying defendant, before the defendant rests their case, relative to the issue of whether the defendant has waived their right to *testify*. The Courts suggest that the Trial Court make such an "on the record" inquiry, in order to avoid issues on Appeal and collateral attacks. Citing LaVigne v. Alaska, 788 P 2d 54-55.

The Petitioner respectfully submits that the Trial Court should have inquired of him in these regards, in order to ensure that he was knowingly and intelligently and voluntarily waiving his right to *testify*. Obviously, had the Court taken just a brief moment to have

made this inquiry, this Appeal would not have been necessitated. This inquiry by the Court, as to the right of the accused to *testify*, is as important to the rights and protection of the rights to the accused, as the very right itself.

The Petitioner respectfully submits that an inquiry by the Court in these regards is mandated, in fact and in law, for a basic reason, to protect the right of the accused to *testify* in his behalf, if he wishes to. An important observation in these regards is the concept that all fundamental rights, of an accused, in our criminal justice system, must be protected by the Court, separate and apart from any representation of an accused by counsel. This principle ensures that the basic rudiments of due process will be protected.

A separate and independent inquiry by the Court, relative to the right of an accused to *testify*, is very simple and very practical. this inquiry, by the Court, would have prevented the very situation in this case. Obviously, the Petitioner wanted to *testify*, and the Petitioner had indicated to his lawyer, at all times, that he was ready, willing, and able to *testify* and, more importantly and fundamentally, that he wanted to testify and, rightly or wrongly, with or without his lawyer's consent, he should have been given that opportunity, and he should not have been denied that basic fundamental right. This is the very reason that the Trial Court should have inquired of the accused, upon the record at the time of the Trial, relative to any waiver by the accused of his right to testify, in order to determine, in

fairness to the accused, as to whether or not their decision, not to testify, is an informed decision. This duty is not burdensome upon the Court and, in a matter of a few brief moments, would have prevented a miscarriage of justice in this case.

The Petitioner respectfully submits that the concept of the right of an accused to *testify*. Obviously, the Petitioner wanted to *testify*, and the Petitioner had indicated to his lawyer, at all times, that he was ready, willing, and able to *testify* and, more importantly and fundamentally, that he wanted to *testify* and, rightly or wrongly, with or without his lawyer's consent, he should have been given that opportunity, and he should not have been denied that basic fundamental right. in one's own behalf is so important that this concept is, in

theory, the very basis of the American system of criminal justice. Only in America is an accused given such rights and protections based upon the rule of law. The Court, as an impartial tribunal, is established for this very reason, to protect and jealously safeguard the fundamental rights of all citizens to the basic rudiment of due process.

An illustration of the nature and extent of the Court's duty, role, and function in our criminal justice system relative to the rights of an accused is the duty, role, and function of the Court in regard to the entry by an accused of a plea of guilty. As this Honorable Court well knows, the duty, role, and function of the Court, in regard to the entry of a guilty plea is very simple, to ascertain, upon the record, once and for

all, if the accused knows, and has been informed of, and as such, knowingly and intelligently waives, their right to a jury trial and, in particular, knowingly and intelligently waives their right to *testify* in their own behalf. The Courts have, over the years, developed the standards for the entry by an accused of a plea of guilty. All Courts, at all times, must make specific inquiries of an accused, upon the record, of their desire to enter a plea of guilty, irrespective of the representation of the accused by counsel.

In regard to the inquiry by the Court, relative to the entry of a guilty plea, the Court has an affirmative and independent duty to inquire of the accused, as to whether or not the entry of a guilty plea is "knowingly" and "intelligently" made, with express

knowledge of the waiver, by them, of their various rights. As this Court has stated, a "valid guilty plea must represent voluntary and intelligent choice by the defendant between available alternatives." Goodall v. U.S., 584 A2d 560 (DC Ct. of App.).

This same type of inquiry, should be mandated, as well, upon the record, any time an accused in a criminal case, chooses not to *testify*. The annals of legal jurisprudence are replete with illustrations of the types of inquiry that must be made by the Court in various situations involving the rights of an accused. The Petitioner will now respectfully submit the justification in law for this particular issue in this particular case.

Another very important point for this Court to note, as it ponders its

decision in this regard, is the fact that the right of an accused to *testify* is the one aspect of the criminal justice process that is totally and completely the right of an accused, and only the accused, and no one else. The other "fundamental rights", which are a part of our criminal justice system, are normally perfected by and through Third Parties, such as the counsel for the accused. However, the concept of the "right to *testify*" is the one right, and the only right, which the accused has, and which no one else has in the case. For example, while the accused may have the right to have a lawyer, either one retained or appointed, nevertheless, the lawyer, while they may participate in the defense and the trial of the case, the lawyer can not *testify* for the accused.

Only the accused can *testify* for himself. No one else can *testify* for the accused.

Also, taking this same line of reasoning to its ultimate conclusion, the role and function of the various Parties in the criminal justice process are rather simple. Obviously, the prosecuting authorities, whether it be State or Federal, have a duty, to the populace at large, to ensure that criminal conduct in society be prosecuted. Further, the role and function of the Judge is to serve, very simply, as an independent, impartial tribunal, the protectorate of the rights of both the prosecuting authorities and of the accused and to ensure that both sides are given a fair trial.

The important point for this Honorable Court to note is that, of all of the basic and fundamental rights

guaranteed to an accused in our criminal justice system, the one and only right which is truly a personal right owned only by the accused, is the right of the accused to take the stand and to *testify* in their own behalf. This is the one right that is owned by the accused, and no one else.

Likewise, and equally as important, is the fact that no one can force an accused to *testify*, as well. As a matter of fact, and as a matter of law, the right of an accused not to *testify* is equally as protected, as the right of an accused to *testify*. As this Court also well knows, if, in the event that an accused does not *testify*, the Court will offer an instruction to the jury, based upon the concept that, while the accused had the right to *testify* that, nevertheless, if the accused chose not to

testify, their failure to *testify* cannot, and should not, be considered by the jury, in any way, as reflecting upon their guilt or innocence and, further, the instruction goes on to provide that the failure of the accused to *testify* is not to be considered to be evidence against them in any regard.

The Petitioner would also respectfully submit to this Honorable Court that this Court has not ever considered the issue, in this Writ, relative to the concept of the duty of the Trial Court to inquire of a non-testifying defendant in these regards. This is a case which begs for recognition by the United States Supreme Court of the obligation of the Trial Court Judge to make a simple inquiry of the accused, at the time of the trial, and upon the record, in regard to their decision, in

the event that the accused does not *testify*. Therefore, this simply inquiry, while not burdensome and not cumbersome, also, does not, in any way, interfere with the administration of justice is, on the contrary, the very means whereby the most fundamental right of an accused in a criminal case may be protected.

CONCLUSION

Basically, the Courts, both State and Federal, are divided as to the best method to follow, to ensure that a non-testifying defendant has knowingly and intelligently and voluntarily waived their right to *testify*. Many of the Courts, which have considered the problem, or the issue, have adopted the "colloquy" method, by which the Trial Judge must engage in an "on-the-record" discussion with the defendant, to ensure

that they have knowingly waived their right to *testify*. People v. Curtis, 681 P. 2d 514 (Colo.). State v. Neuman, 371 SE 2d 77 (W.Va.). Culberson v. State, 412 SO. 2d 1184. U.S. v. Martinez, 883 F. 2d 761 (9th Cir). La Vigne v. State, 788 P. 2d 52 (Alaska). Pursuant to this approach, if the defense rests, without calling the defendant, the Trial Judge, as a matter of routine, conducts an inquiry, outside the jury's presence, into the circumstances of the waiver.

Another approach has led a second group of Courts to adopt the "demand" rule, whereby a defendant, who fails to complain about the right to *testify* during the trial, is conclusively presumed to have waived that right. Courts using the "demand rule" will not entertain a post-trial challenge based on the right to *testify*. U.S. v. Edwards,

897 F. 2d 445 (9th Cir). State v. Allie, 710 P.2d 430 (Ariz). State v. McKinney, 561 P.2d 432 (Kan). People v. Simmons, 364 N.W. 2d 783 (Mich). In Re Mercier, 460 A.2d 472 (Vt.); State v. Albright, 291 N.W. 2d 487 (Wis.).

A third group of Courts has crafted a compromise between the two (2) previous methods. This group of Courts follow the "post-trial challenge" approach, which provides that a Trial Judge need not "sua sponte" question the defendant during the trial, but the defendant is free to bring a post-conviction challenge based upon a denial of the right to *testify*. United States v. DiSalvo, 726 F. Supp. 596 (E.D. Pa). Siciliano v. Vose, 834 F.2d 29 (1st Cir.). Therefore, in conclusion, it appears that, due to all of the mass confusion, which currently exists among the various Courts, relative to the

procedure to be followed in a case involving a non-testifying defendant, it would seem that the Trial Courts should be required to make an "on-the-record inquiry" in order to avoid issues on Appeal and collateral attacks. Lavigne, Supra. As the Court said in Lavigne, supra, the "only clear way to establish whether the defendant is waiving his right to counsel is to require Trial Judges to establish on the record, that the defendant understands his right to *testify* and is waiving that right", since cases "clearly lack uniformity in the treatment of the defendants right to *testify*". As the Court also said in Culberson, supra, "We suggest to the Trial Judges of the State (Mississippi), that, in any case where a defendant does not *testify*, before the case is submitted to the jury, the defendant should be

called before the Court, out of the presence of the jury, and advised of his right to *testify*."

The Court in Boyd, supra, made a very astute observation in support of the proposition for an "on-the-record", "sua sponte" inquiry, when it observed that, "Such action by the Court could be considered to be protective action, protective of the defendants rights, the government's interest in finality of convictions, and the public's interest in the orderly administration of justice, as well as trial counsel's interest in avoiding an ineffective assistance of counsel claim, as well as a host of other problems. In this regard, by making a record, in a timely manner, this will eliminate re-trials and controversies on Appeal and collateral proceedings, long after the trial is concluded, as has been

determined by Colorado in applying the on-the-record approach". The Court in Colorado has noted a marked decrease in challenges made using this issue, and the ability to deal with the post-trial conviction issue with a good record made at the trial.

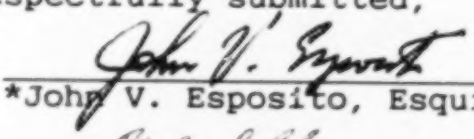
Therefore, it follows that the "serious and weighty responsibility" of ascertaining whether there is an intelligent and competent waiver of such a right to *testify* by the accused is imposed upon the Trial Judge. Johnson, supra. The purpose of advisement by the Court "on-the-record" is to ensure that waiver of a fundamental Constitutional right is intelligent and knowing, to preclude post-conviction disputes between defendant and counsel over the issue, and to facilitate Appellate Review. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct.

1709, 23 L.Ed 2d 274. By placing the elements of intelligent waiver upon the record at the time of trial, the Trial Court can accurately determine whether the waiver was, indeed, intelligent and competent, and that determination will be readily reviewable upon Appeal. Hollenbeck v. Estelle, 672 F.2d 451 (5th Cir.) The alternative not only increases the chance of error, but is wasteful of judicial resources, as well.

Therefore, the Petitioner, Ernesto Aleotti, respectfully requests that this Honorable Court issue a Writ of Certiorari in this case, and decide the issue, once and for all, in order to allow the Courts, State and Federal, to have some guidance and provide uniformity addressing this issue. Equally as important is the fact that the Petitioner deserves to be restored to his

Constitutional rights and be given the opportunity to *testify*, at his trial in this case in the spirit of manifest justice. Thank you.

Respectfully submitted,



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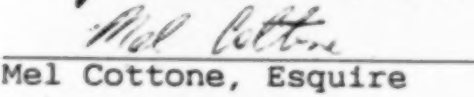

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APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 93-CO-553

Ernesto Aleotti,

Appellant,
Cr. No. M4677-91

v.

United States,

Appellee.

Appeal from the Superior Court of the
District of Columbia
Criminal Division

(Hon. Brook Hedge, Trial Judge)

(Argued March 1, 1994

Decided March 3, 1994)

Before Terry, Steadman, and Schwelb,
Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

Aleotti was convicted by a jury of malicious destruction of property. At the sentencing proceeding, he claimed for the first time that his attorney did not permit him to *testify* at trial, and that

he was thus denied a fundamental right. He renews this claim on appeal.

This case turns entirely on a credibility determination by the trial judge. At a post-trial hearing, the judge heard the testimony of Aleotti and of his trial counsel. The attorney testified that he and Aleotti had agreed that Aleotti would not take the stand. Aleotti claimed that he had never so agreed and that he had expected to *testify*. The judge, who had the opportunity to observe the witnesses and to assess their demeanor, analyzed Aleotti's claim in a detailed oral ruling. The judge credited the testimony of the attorney and rejected that of Aleotti.[1] We cannot second-guess the judge's finding. *See, e.g., D.C. Code*

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[1] In his brief on appeal, Aleotti essentiall
trial counsel's testimony and the judge's credibili

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17-305 (1989); In re S.G., 581 A.2d 771, 774-75 (D.C. 1990).

Aleotti contends that the trial judge should have made an inquiry at trial, *sua sponte*, as to whether the defendant wished to take the stand. We have held, however, that no such inquiry is required. *See Woodward v. United States*, 626 A.2d 911, 914-915 (D.C. 1993), and authorities there cited. Accordingly, Aleotti's conviction is hereby

Affirmed

FOR THE COURT

William H. Ng
Clerk of the Court

Copies to:

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Supreme Court, U.S.
FILED
AUG - 4 1994
OFFICE OF THE CLERK

(2)

No. 93-1921

In the Supreme Court of the United States

OCTOBER TERM, 1994

ERNESTO ALEOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Constitution required the trial judge to inquire *sua sponte* whether petitioner was knowingly and voluntarily waiving his right to testify in his defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1921

ERNESTO ALEOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 61-63) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. The petition for a writ of certiorari was filed on May 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on one count of malicious destruction of property, in viola-

tion of D.C. Code § 22-403 (1981). He was sentenced to 12 months' probation and 40 hours of community service, and ordered to pay $140.98 in restitution to the complainant. The District of Columbia Court of Appeals affirmed. Pet. App. 61-63; Gov't C.A. Br. 1-2.

1. Petitioner and Patricia Barrs, the complainant, lived together for more than ten years. On January 1, 1990, Barrs moved out, and one year later she completely severed her relationship with petitioner. Petitioner continued to contact Barrs and her friends, however, and became very angry when Barrs told him not to contact her any longer. Gov't C.A. Br. 2.

Between April and May 1991, Barrs' car tires were damaged several times. On May 2, 1991, Barrs contacted the police and told them she suspected petitioner was responsible for the damage. She made arrangements to have police surveillance of her car the following day. Gov't C.A. Br. 2-3.

On May 3, 1991, Barrs parked her car in front of an apartment building on the east side of Connecticut Avenue, N.W., in Washington, D.C. Before going inside the building, she checked her tires and noted that they were fully inflated. Shortly thereafter, Sergeant John Hickey of the Metropolitan Police Department arrived at the building and also examined the tires to ensure that they were fully inflated. Sergeant Hickey then set up a video camera inside a van with tinted windows directly across from the apartment building into which Barrs had gone. Sergeant Hickey filmed persons approaching Barrs' car and, from time to time, the car tires. Gov't C.A. Br. 3-4.

From his vantage in the police van, Sergeant Hickey first saw petitioner walking toward the van on

the otherwise deserted street. Petitioner crossed the street, walked past Barrs' car, looked up at the apartment building, and returned to Barrs' car. Sergeant Hickey saw petitioner crouch down as he approached the front tire on the passenger side of Barrs' car and make a motion with his arm. Petitioner then got up, walked to the rear tire, crouched down, and repeated the same arm motion. The front passenger side of the car took a distinctive dip. Gov't C.A. Br. 4.

Sergeant Hickey arrested petitioner as he walked away from the car. Returning to Barrs' car, Sergeant Hickey noticed that the tires on both the front and rear passenger side of the car were flat. Gov't C.A. Br. 4-5.

2. After a jury trial at which he did not testify, petitioner was found guilty. At his sentencing hearing, the trial court held an ex parte bench conference with petitioner and his trial counsel to tell them she had received four letters alleging that petitioner had received ineffective assistance of counsel. The court noted that petitioner had not demonstrated any dissatisfaction with his trial counsel, Robert Boraks, and that he appeared to be capable of raising any such claim on his own. When the judge asked petitioner if he was satisfied with his counsel, he replied that he was not. Petitioner stated that he had wanted to testify at trial and had so informed his trial counsel. The trial court continued the sentencing to enable petitioner to retain new counsel. Gov't C.A. Br. 6; 12/18/92 Tr. 2-13, 17-21.

At the hearings on petitioner's motion for a new trial, petitioner testified that he knew he had the right to testify in his own behalf and that he had

fully intended to testify at trial. Petitioner stated that his initial trial counsel, Allen Dale, had prepared him to testify, and that when Robert Boraks took over his representation, the defense plan discussed by Dale, Boraks, and petitioner included petitioner's testimony.[1] Petitioner claimed that he was "shocked" when his attorney rested the defense case without putting petitioner on the stand. At that point, petitioner said, he grabbed Boraks' arm, but Boraks silenced him. Gov't C.A. Br. 6-7; 2/1/93 Tr. 15-25.

Petitioner admitted that he had informed the trial court about his desire to testify for the first time at the sentencing hearing. He claimed that he had been afraid to say anything to the court before because he had been admonished to refrain from making facial gestures during the testimony of the government's witnesses. Petitioner also testified that Boraks never discussed trial strategy or his testimony with him. Gov't C.A. Br. 8; 2/1/93 Tr. 23-25, 54-59.

Boraks, a criminal defense lawyer with more than 20 years' experience, testified that he had originally planned to put petitioner on the stand, following Dale's trial strategy. One month before trial, however, he made the tactical decision that petitioner should not testify. Boraks explained that he was concerned about the jury's ability to understand petitioner's accent, petitioner's emotional attachment to the case, the credibility of petitioner's story, and the fact that that story helped to fill in several of the gaps in the government's case. Boraks discussed the

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[1] Petitioner originally retained Dale to represent him. Dale suggested that Boraks replace him, however, when petitioner moved to dismiss the case on the ground that the government had tampered with the car tires, and it appeared that Dale would be needed as a witness. 2/1/93 Tr. 2-12.

issue with several other attorneys, as well as with petitioner. Boraks stated that petitioner had agreed to follow his advice. Gov't C.A. Br. 9; 2/1/93 Tr. 120, 122-132, 145.

Boraks also testified that petitioner never expressly said he wanted to testify at any point before, during, or after the trial, and that petitioner did not grab his arm when Boraks rested the defense case. While petitioner gave Boraks many ideas about his defense throughout the trial, he never disagreed with Boraks about the decision not to testify, nor did he express any displeasure with Boraks until his sentencing. Moreover, following a telephone call from Dale during trial, Boraks asked petitioner if he was dissatisfied with the trial and wanted to testify. Petitioner told Boraks he respected Boraks' judgment, and not to worry. Gov't C.A. Br. 10; 2/1/93 Tr. 131-136, 146, 163-164.

3. The trial court denied petitioner's motion for a new trial. The court held that there was no question petitioner knew he had the right to testify. It also found Boraks' testimony more credible than that of petitioner, noting that Boraks was an "esteemed criminal lawyer" with a great deal of experience and without reason to fabricate. The court also held that petitioner had understood and agreed with Boraks' tactical decision that he not testify. Moreover, the court had observed no indications at trial that petitioner was dissatisfied with Boraks' representation of him. Given the totality of circumstances, the court concluded that Boraks had fully counselled petitioner about testifying and that petitioner had accepted Boraks' advice. Gov't C.A. Br. 11-12; 3/19/93 Tr. 30-36.

4. The District of Columbia Court of Appeals affirmed. Pet. App. 61-63. The court held that it could not "second-guess" the credibility determination made by a trial court that had observed the witnesses and assessed their demeanor. *Id.* at 62. The court also reaffirmed its earlier holding in *Woodward* v. *United States*, 626 A.2d 911, 913-915 (D.C. App. 1993), that the trial court is not required to ask, *sua sponte*, whether a defendant wishes to testify. Pet. App. 63.

ARGUMENT

1. Petitioner renews his contention (Pet. 11-15, 18-60) that the trial court was required to advise him of his constitutional right to testify and to determine whether his wavier of that right was a knowing and voluntary one. That contention lacks merit. The Constitution protects the right of a criminal defendant to testify in his own defense. *Rock* v. *Arkansas*, 483 U.S. 44, 49-53 (1987); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975); *Brooks* v. *Tennessee*, 406 U.S. 605, 612 (1972). The trial judge, however, is not required to inform a defendant who is represented by counsel that he has a right to testify, or to question the defendant about whether his decision not to testify (*i.e.*, to assert his Fifth Amendment right to remain silent) is a knowing and voluntary one. See *United States* v. *Campione*, 942 F.2d 429, 439 (7th Cir. 1991); *United States* v. *McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (per curiam); *United States* v. *Edwards*, 897 F.2d 445, 446-447 (9th Cir.), cert. denied, 498 U.S. 1000 (1990); *United States* v. *Bernloehr*, 833 F.2d 749, 751-752 (8th Cir. 1987); *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987); *United States* v. *Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983), cert. denied, 465 U.S. 1036 (1984); see

also *United States* v. *Teague*, 953 F.2d 1525, 1532-1533 & n.8 (11th Cir.) (en banc) (expressing the view that it would be "inappropriate" to require trial court to discuss the decision whether to testify with the defendant), cert. denied, 113 S. Ct. 127 (1992).

The decision whether to testify is, in large part, a matter of trial strategy. While the ultimate decision whether to testify belongs to the client, the discussions leading up to that decision are traditionally the preserve of counsel and client alone. See *United States* v. *Martinez*, 883 F.2d 750, 760-761 (1989), vacated on other grounds, 928 F.2d 1470 (9th Cir.), cert. denied, 111 S. Ct. 2886 (1991). It is the responsibility of defense counsel—not the trial judge—to inform the defendant of his right to testify and to outline the considerations relevant to the exericse of that right. *Teague*, 953 F.2d at 1533; see *Hollenbeck* v. *Estelle*, 672 F.2d 451, 453 (5th Cir.), cert. denied, 459 U.S. 1019 (1982).

To require the trial court to ask about a defendant's failure to testify would risk intruding into the attorney-client relationship and interfering with defense strategy. *Teague*, 953 F.2d at 1533 n.8; *Campione*, 942 F.2d at 439; *Bernloehr*, 833 F.2d at 752 n.3. In addition, by advising the defendant of his right to testify, the trial court "could inappropriately influence the defendant to waive his constitutional right *not* to testify, thus threatening the exercise of this other, converse, constitutionally explicit, and more fragile right." *Siciliano*, 834 F.2d at 30; *Martinez*, 883 F.2d at 760.

Here, the trial court found that petitioner knew of his right to testify and voluntarily waived that right. At the post-trial hearing, petitioner testified that he knew of his right to testify because he had

discussed and prepared his testimony with his original attorney, Dale. The trial court credited Boraks' testimony that petitioner neither objected nor expressed any other sign of displeasure when Boraks did not put petitioner on the stand and rested the case. The trial court also believed Boraks' testimony that petitioner had never insisted upon testifying and that the two had agreed that, for tactical reasons, he would not take the stand. In those circumstances, the trial court properly concluded that petitioner waived his right to testify. See *United States* v. *Joelson*, 7 F.3d 174, 177 (9th Cir.) (waiver inferred from defendant's conduct), cert. denied, 114 S. Ct. 620 (1993); *McMeans*, 927 F.2d at 163 (where defendant knew of his right to testify, his failure to testify was of his own choosing); *United States* v. *Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir.) (accused "must act affirmatively" to express his desire to testify), cert. denied, 474 U.S. 847 (1985).

2. Petitioner contends (Pet. 11-12, 42, 53-60) that the courts are divided over whether the trial court must make an inquiry at trial, *sua sponte*, into whether the defendant understands and has voluntarily waived his constitutional right to testify. As discussed above, all of the federal courts of appeals that have considered the issue have held that the trial court does not have such an obligation.[2] The major-

[2] Contrary to petitioner's assertion (Pet. 54), the Ninth Circuit did not hold in *United States* v. *Martinez, supra,* that the trial court must conduct an on-the-record colloquy concerning the defendant's right to testify. Rather, the court held that waiver of that right could be inferred from a counseled defendant's failure to testify at trial. The trial court "has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. The defendant's conduct provides

ity of state courts, including the court below, have also declined to require the trial court to inform the defendant of his right to testify and to conduct an on-the-record colloquy on the voluntariness of his waiver.[3] See, *e.g.*, *Woodward* v. *United States*, 626 A.2d at 913-915; *Taylor* v. *State*, 843 P.2d 682, 688 (Kan. 1992); *State* v. *Hamm*, 818 P.2d 830, 833 (Mont. 1991); *State* v. *Savage*, 577 A.2d 455, 473 (N.J. 1990); *Aragon* v. *State*, 760 P.2d 1174, 1178-1179 (Idaho 1988); *Torres-Arboledo* v. *State*, 524 So. 2d 403, 409-411 (Fla.), cert. denied, 488 U.S. 901 (1988); *Commonwealth* v. *Waters*, 506 N.E.2d 859, 865 (Mass. 1987); *People* v. *Simmons*, 364 N.W.2d 783, 784-785 (Mich. Ct. App. 1985); *State* v. *Allie*, 710 P.2d 430, 438 (Ariz. 1985); *In re Mecier*, 460 A.2d 472, 475-476 (Vt. 1983); *State* v. *Albright*, 291 N.W.2d 487, 491-493 (Wis.), cert. denied, 449 U.S. 957 (1980); see also *State* v. *El-Tabech*, 453 N.W.2d 91, 95 (Neb. 1990).

A handful of state courts have required the trial court to conduct an on-the-record colloquy with the

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a sufficient basis from which to infer that the right to testify has been waived." 883 F.2d at 760.

[3] Petitioner correctly states (Pet. 39-40) that in *Boyd* v. *United States*, 586 A.2d 670 (D.C. App. 1991), the court required the trial court to inquire whether defendant's waiver of her right was voluntary. The inquiry at issue in *Boyd*, however, arose after the defendant made known her desire to testify. *Id.* at 677. The court held that once a trial judge is aware that the defendant wanted to testify but did not, the judge has a duty to hold a hearing to determine whether the defendant voluntarily waived his right. *Ibid.* The court declined to decide whether a trial court has the duty to conduct a colloquy during trial, *sua sponte*, informing the defendant of his right to testify. *Id.* at 677-678.

defendant to inform him of his right to testify and to ascertain whether he has knowingly, intentionally, and voluntarily waived that right. See *LaVigne* v. *State*, 812 P.2d 217, 222 (Alaska 1991); *State* v. *Neuman*, 371 S.E.2d 77, 81-82 (W. Va. 1988); *People* v. *Curtis*, 681 P.2d 504, 514 (Colo. 1984); see also *Culberson* v. *State*, 412 So. 2d 1184, 1186 (Miss. 1982) (suggesting that trial court advise defendant, on the record, of the right to testify where the defendant has not testified). In our view, those decisions place burdens on trial judges beyond what the Constitution requires. This case, however, does not present an appropriate occasion to address the issue. As the trial court found, petitioner knew he had the right to testify, indicated his agreement with his attorney's tactical decision not to put him on the stand, and made no objection until sentencing. The trial court did not believe petitioner's post-verdict testimony that he had expected to testify and had not agreed with his attorney not to testify. The trial court also determined that petitioner's waiver of his right to testify was knowing and voluntary. In the face of those findings, a prophylactic rule requiring the trial court to inform the defendant of his right to testify would not have benefitted petitioner. Resolution of the issue by this Court, if warranted, should await a case in which the Court's decision might affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1994

CASE NUMBER 93-1921

ERNESTO ALEOTTI, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY OF PETITIONER TO BRIEF IN OPPOSITION BY RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court Judge, in the trial of a criminal case, should make an inquiry, upon the record, of a non-testifying defendant, prior to the close of the trial of the case, as to whether or not the defendant is knowingly, intelligently, and voluntarily waiving their right to testify.

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ARGUMENT

The Petitioner respectfully submits that the question before the Court begs for consideration and resolution by this Honorable Court. There is conflict and confusion among the Trial Bar, as well as among the Courts, both at the State and Federal level, as to the entire issue of the procedure to be followed in criminal cases in which the Defendant does not testify. As indicated in the Petition in this case, the issue presented in this case currently before the Court has not been decided by this Court and, therefore, this Court should seize this moment to resolve this issue. Contrary to the position of the Respondent, this High Court should be guided, not by the question as to whether or not its Decision will, in any way, impact upon the ultimate conclusion in this case.

More importantly, this High Court has the solemn duty of interpreting the Constitution of the United States, irrespective of whether or not the resolution of this issue by the Court would affect, ultimately, the outcome of the Trial of Ernesto Aleotti.

Therefore, the mere notion by the Respondent that this Court "...should await a case in which the Court's Decision might affect the outcome" is ludicrous. This Honorable Court, sitting very much as the Lady of Justice, should be blindfolded, as to the personalities in a case, and look more to the substance of the issue before the Court in such a case. As indicated, this issue has been the subject of many cases, both at the Trial level, as well as at the State and Federal Appellate levels. The decisions of the Courts in this regard are in

conflict and should be resolved. Thus, it is important that this Honorable Court review the issue presented in this case, and grant this Petition, in order to clarify this issue now, once and for all and end all of the confusion.

Perhaps the best analysis of this very important issue was set forth by Professor Timothy P. O'Neill in that certain Law Review article captioned, "Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for An On-The-Record Waiver". Professor O'Neill is an Associate Professor of Law at the John Marshall Law School. His Treatise appears in the University of Pittsburgh Law Review, Vol. 51, Edition No. 4, Summer of 1990. The Petitioner, in addition to citing this Article for the Court's review and consideration, would

also submit that this Law Review Article by Professor O'Neill is one of the best dissertations analyzing the essence of this issue, to-wit, the right of an accused to testify in a criminal case. Professor O'Neill traces the history and evolution of the general concept of the right of an accused to testify, from the beginning, through the present, addressing, in conclusion, the essence of this Appeal, the concept of the importance of having a clear and articulated recitation upon the record, of the decision by an accused in a criminal case to waive their right to testify. As such, the Petitioner respectfully begs this Court's indulgence and review of the Law Review article by Professor O'Neill.

Professor O'Neill sets forth some basic reasons why this issue should be given great priority. In particular, he suggests the following, to-wit:

> "Thus, prevailing case law suggests that the Supreme Court would find that the right to testify can only be waived personally by the defendant. Several policy reasons also argue in favor of recognizing that such a decision should be the defendant's alone. First, if the defendant should have final say over whether to exercise those rights deemed "inherently personal and basic, People v. Curtis, 681 P.2d 504, 511 (Colo. 1984), it would seem proper to include among these the right to testify, deemed by one court to be "of inestimable value". Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955). The Supreme Court has noted that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself, Green v. United States, 365 U.S. 301, 304. As noted above, the *Rock* Court itself analyzed the situation to a defendant's decision to represent himself at trial if he so chooses, Faretta v. California, 411 U.S. 806 (1975), and concluded that the

decision whether or not to testify is an equally personal decision. If the defendant should be given every opportunity to make those decisions which may result in his remaining free from incarceration, clearly the right to testify is one of them.

"Even if the majority of defendants were to make foolish tactical decisions on this issue, there is a second, more philosophical, reason why a defendant should still be given this power. At least one commentator has expressed it in terms of "human dignity":

> If the right to testify in one's own behalf is to have any meaning, it cannot be taken away from a defendant who feels the human instinct to meet the accusations against him despite counsel's advice that unfortunate consequences may result. A defendant should be recognized as having a basic right to plead his case before his peers, and neither the court not defense counsel should be permitted to deprive a defendant of that right to exercise his free will. Wright v. Estelle, 572 F.2d 1071, 1078-79 (5th Cir.).

"As Judge Godbold wrote in Wright v. Estelle, regardless ow whether choosing to testify is tactically correct, the defendant's "desire to tell 'his side' in a public forum may be of overriding importance to him .... The wisdom or unwisdom of the defendant's choice does not diminish his right to make it. Wright v. Estelle, 572 F.2d 1071, 1078-79 (5th Cir.).

"The legal literature points out a third consideration, namely that in practice defense attorneys accede to a defendant's desire to testify over an attorney's objection. A review of the literature in the area led one commentator to conclude that it was the "general belief of expert criminal attorneys" that the defendant must agree before his right to testify is waived. Professor Amsterdam perhaps best summarized this view from the defense attorney's perspective: "Counsel may properly urge the defendant that it is unwise or dangerous for the defendant to take the stand. If, however, a defendant wishes to testify despite advice to the contrary, it is probably best to yield to his or her stubbornness". 1. A Amsterdam Trial Manual for The Defense of Criminal Cases, Sect. 391. (4th Ed. 1984).

> This is not to suggest that courts are unanimous in finding the decision of whether or not to testify to be personal to the defendant. United States v. Norwood, 798 F.2d 1094, 1100 (7th Cir.). Yet the potent combination of lower court case law, legal literature, and signals from the Supreme Court would seem to suggest that this will be firmly established in the future.

Further, Professor O'Neill suggests a possible solution, an "on-the-record" waiver, without judicial involvement. Professor O'Neill explained this approach as follows, to-wit:

> "In Curtis, the Colorado Supreme Court described in some detail how a waiver should be obtained from a defendant who does not choose to testify. People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984). Courts in other jurisdictions have heatedly debated the propriety of having a trial judge obtain a waiver in the manner suggested by Curtis.
>
> "Yet it does not appear that any court has noticed footnote 13 of the Curtis opinion and the accompanying text. There, the court directly confronted the concern, voiced by the

Wisconsin Supreme Court in State v. Albright, 96 Wis. 2d 122, 291 N.W. 2d 487 (1980), that injecting the trial judge into the defendant's decision to testify was fraught with difficulty. Curtis and Albright's concerns, holding that the trial court "generally" will advise the defendant properly. Yet Curtis went on to say: "The trial judge could discharge this duty by permitting defense counsel to question the defendant on-the-record in the presence of the judge. There may be situations where it would be preferable to determine the defendant's wishes in that manner. Curtis makes no attempt to describe what these "situations" might be. It does not appear that nay court has noticed this important suggestion in Curtis that it might be possible to obtain an on-the-record waiver of the right to testify while avoiding judicial involvement in the procedure. Yet such a procedure would seem ideal for those courts which desire an on-the-record waiver but wish to exclude the trial judge.

"Obtaining a waiver through a procedure which circumvents the trial judge would not seem to raise any constitutional problem *per se*, even if the right is considered personal to the defendant. For example, a

guilty plea is valid only if the defendant tenders it voluntarily, intelligently, and understandingly. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). Yet the Supreme Court has refused to require on constitutional grounds any specific warnings from the trial judge; rather, the focus is on whether the plea itself is voluntary and intelligent. Likewise, it is not constitutionally required that the trial judge and the defendant engage in a colloquy in order for a jury waiver to be found valid. United States v. Cochran, 770 F.2d 850 (9th Cir. 1985); United States v. Martin, 704 F.2d 267 (6th Cir. 1983); United States v. Scott, 583 F.2d 362 (7th Cir. 1978). There is no reason, then, why a colloquy between judge and defendant concerning the defendant's right to testify should be required as a constitutional matter even if the right to testify is considered a fundamental personal right.

"Moreover, placing the onus of establishing the waiver on the defense solves another problem that arises when courts confront this issue: "When then ought the colloquy between judge and defendant occur? The judge cannot know that the defendant has not testified until the defense has rested.

> That is surely an awkward time to engage in a discussion with the defendant which might lead to a rupture with defense counsel...." In a system in which the defense takes the initiative, this problem is avoided. It is up to the defendant and his attorney to decide when they wish to place the waiver of the right to testify into the record.
>
> "The courts which have rejected the Curtis system of on-the-record waiver have simply assumed that the trial judge must take the leading part in such a procedure. It is time, then, to consider seriously Curtis's suggestion of an alternative which bypasses the trial judge.

In conclusion, as Professor O'Neill suggests, this Court could consider alternatives to ensure a proper waiver of the accused's right to testify. Professor O'Neill suggests several alternatives, which the Petitioner respectfully submits are applicable for this Court's consideration of this important issue. Professor O'Neill

suggests such alternatives, as follows, to-wit:

> "The alternative system would be comprised of the following:
>
> 1. At every criminal trial, the defendant must either a) testify on his own behalf or b) waive his right to testify on the record.
>
> 2. Consistent with A.B.A. Standards, it is the responsibility of the defense attorney to tell the defendant a) that the defendant has the right to testify and b) that, although the defense attorney will offer advice on this matter, the ultimate decision of whether to testify rests with the defendant.
>
> 3. If, after weighing the advice of counsel, the defendant decides not to testify, it is the responsibility of the defense attorney to request a hearing outside the presence of the jury at some point during the defense case.
>
> 4. At this hearing, through questions posed by the defense attorney, the defendant should affirm that 1) he understands he

has the right to testify; b) that he understands that no one can prevent him from exercising this right; c) that if he testifies the prosecutor will have the opportunity to cross-examine him; and, if applicable, d) that there is a possibility that his testimony might be impeached with prior criminal convictions. His waiver should then be made orally as part of the trial record.

5. A written waiver should also be made part of the trial record.

6. As a general rule, the prosecution and the trial judge should play no role in the proceedings. However, the trial judge may pose questions to the defendant and/or the defense counsel if the judge, in her discretion, believes that there is evidence that the defendant is not making a knowing and intelligent waiver of the right to testify.

CONCLUSION

In conclusion, the Petitioner, Ernesto Aleotti, respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and address the issue presented. The time is ripe, in the evolution of the principles of jurisprudence in the area of criminal law in the United States, that this last remaining substantive issue be resolved by this Honorable Court. There are, and will continue to be, an increasing number of criminal trials and, often, the Defendant will not testify. Thus, there will be more and more Appeals and Writ of Habeas Corpus, both at the State and Federal level, which Appeals and Writs involve this very issue. Thus, to eliminate these Appeals and for judicial economy, and for clarification of this issue for all Parties, the accused, the

lawyers, and for the Judges, this Court should address the question presented for review in this case. Hence, the Petitioner, Ernesto Aleotti, respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, and establish the Rule of Law on this issue, once and for all. Thank you.

Respectfully submitted,

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